

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7222

United States Court of Appeals
FOR THE SECOND CIRCUIT

ELIAS LESTER, M. D.,

Petitioner-Appellant

v.

EMLYN I. GRIFFITH, Regents Committee on Discipline,

Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ
Attorney-General of the
State of New York
261 Madison Avenue
New York, New York 10016

(212) MU 7-5850

SAMUEL A. HIRSHOWITZ

JOHN J. O'GRADY

Assistant Attorneys General
of Counsel



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Docket No. 75-7222

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EMLYN I. GRIFFITH, Regents Committee on Discipline,

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BRIEF FOR RESPONDENT-APPELLEE

Issues Presented for Review

1. Should this appeal be dismissed as moot since the relief sought in the District Court was to enjoin a report to the Board of Regents by its Subcommittee on Discipline which had already been made before the return date of the motion in the District Court?

2. Did the District Court properly dismiss a motion to enjoin respondent from continuing a medical disciplinary hearing pending before the New York State Board of Regents on the basis of the doctrines enunciated in *Younger v. Harris*, 401 U.S. 37 (1971); *Huffman v. Pursue Ltd.*, — U.S. —, 43 L. ed. 482 (1975) and *Geiger v. Jenkins*, 401 U.S. 985 (1971), affirming 316 F. Supp. 370 (D.C. Ga. 1970)?

3. Should petitioner-appellee's attempt on this appeal to argue the merits of a State disciplinary hearing which were not raised in the District Court be rejected?

Statement of the Case

Preliminary Statement

Appellant (Lester) appeals from an order of the United States District Court for the Eastern District of New York (BARTELS, J.) (61a),* dated March 21, 1975, denying his motion for an injunction.

By Order to show cause, returnable March 14, 1975 but argued March 21, 1975, Lester sought to enjoin Emlyn I. Griffith (Chairman of the Regents Subcommittee on Discipline sitting for the month of February, 1975) from "submitting any report in reference to Petitioner to the N.Y. Board of Regents with purpose and design to revoke Petitioner (sic) M.D. License, and that such report should be DISMISS (sic), for the reason that the Respondent being the chairman of a hearing on February 5, 1975 deny (sic) to subpoena a few witnesses not being public officials, which Honorable Justice John R. Bartels on a hearing before him on January 24, 1975 directed John J. O'Grady, one of the Attorney's (sic) of Respondent that Petitioner Elias Lester be allowed to subpoena certain witnesses" (4a-5a).

On March 21, 1975, after argument, the District Court dismissed the motion for an injunction stating that it would abstain from enjoining State action until the State courts had the opportunity to perform their legal function (53a). The District Court further indicated that the petitioner had not been aggrieved because the State proceeding had not been concluded (54a).

* Numbers in parentheses refer to pages in Appellant's appendix.

As to the allegation concerning denial of the right to subpoena witnesses, the District Court held that even if such a right had been denied, it would abstain from ruling thereon at this time until there is a review first by the State courts (55a). The Court further indicated that if, in fact, it had understood that the evidentiary hearing had been completed in February and July, 1974, and that the hearing of February 1975 was not an evidentiary hearing, there would be no need for subpoenas to be issued and that relief would have been denied (55a). This appeal followed (62a).

Statement of Facts

(1)

Even though the merits of the disciplinary hearing held in the state administrative forum are not properly presented before this Court upon this record,* the essential facts thereof are briefly set forth to counter the scurrilous, intemperate and wholly irrelevant, personal attack upon the integrity of counsel for the appellee which pervades the appellant's moving papers and brief.

(2)

On December 20, 1973, a disciplinary proceeding before the New York State Board for Medicine (Hearing Panel) was instituted under the New York Education Law §§ 6509 and 6510, charging Lester with being unfit for the practice

* A complete transcript of the disciplinary hearing before the State agency which began on February 15, 1974 and was concluded on July 26, 1974, as well as Exhibits 1 through 13 and Exhibit A, which were received in evidence at that hearing, were appended to the answering affidavit before the District Court. This material, substantially all of which was in the possession of the petitioner at the time of the return of the motion, is a part of the State administrative record herein, certain portions of which have been reproduced in the appellant's appendix.

of medicine by reason of mental disability. The charges were duly served by mail upon Lester pursuant to the provisions of the New York Statute [Educ. Law § 6510(1e)] after attempts at personal service within the State were unsuccessful. On January 7, 1974, Lester appeared in the disciplinary hearing by filing an answer and request for subpoenas by mail from Israel (23a).

On January 21, 1974, an additional document was received from Lester consisting of a request for additional subpoenas. Both of these documents were placed in evidence at the disciplinary hearing and were submitted to the District Court as Exhibits 3A and 5 annexed to the answering affidavit (23a).

On January 24, 1974, a letter was sent to Lester (13a-14a) declining to issue the more than 50 subpoenas requested but advising him to appear personally before the Hearing Panel and apply in person for the subpoenas. He was advised that the issuance of subpoenas to witnesses whose testimony was shown to be relevant to the issues of the disciplinary hearing would not be opposed (23a).

On February 15, 1974, a five-member Hearing Panel of the New York State Board for Medicine convened to hear testimony concerning the charges against Lester. Lester did not appear in person or by counsel but sent his brother requesting an adjournment for the purpose of allowing him sufficient time to make arrangements to appear in person with counsel to represent himself. A lengthy adjournment for that purpose was granted (24a).

On July 26, 1974, the adjourned date, the Hearing Panel reconvened, and again Lester failed to appear. However, he submitted a copyrighted "letter to Honorable Senator L. Weicker by Elias Lester, M.D." consisting of 112 pages as well as a telegram directed to the Hearing Panel, which were received in evidence. On that day, the evidentiary hearing was concluded.

Thereafter, on December 13, 1974, the Hearing Panel, pursuant to State law, issued its report of findings and recommendation to the Regent's Subcommittee on Discipline (64a-69a) concluding that Lester was guilty of practicing medicine while his ability to practice was impaired by mental disability. The finding was based upon the entire record, including the voluminous documentation submitted by Lester himself.

In accordance with State procedure, a Regent's Subcommittee on Discipline was convened on February 5, 1975 to review the findings and recommendations and make its own recommendations thereon to the Full Board of Regents (N.Y. Educ. Law § 6510). Notice of that meeting was given to Lester by letter dated January 3, 1975, at which time a copy of the findings and recommendation of the Hearing Panel was also furnished to him (27a).

(3)

After receiving that communication, Lester moved on January 24, 1975,* in the United States District Court for the Eastern District of New York to enjoin the Chairman of the Hearing Panel (Kamen) from forwarding his report to the Regent's Subcommittee on Discipline. In addition, Lester sought the issuance of over 50 subpoenas for the purpose of presenting evidence at the meeting of the Regent's Subcommittee on Discipline scheduled for February 5, 1975.

The Attorney General, as Counsel for the respondent, Kamen, argued against such issuance on the ground that the time for evidentiary hearings had long since passed. The meeting scheduled for February 5, 1975 was in the nature of an administrative appellate review in which the transcript and exhibits as well as the recommendations of

* This motion for injunction was prior to and named a different party than the injunction which is the subject of this appeal.

the Hearing Panel would be reviewed. Apparently, the District Court accepted Lester's statement that testimony would be offered before the Regent's Subcommittee, although that misapprehension was not apparent to counsel for Kamen until May 24, 1975 during the argument in the instant case. The District Court, nevertheless dismissed Lester's motion on January 24, 1975.

(4)

At the suggestion of the District Court, counsel for Kamen discussed subpoenas with Lester in the hallway of the Courthouse. Thereafter, as suggested by the attorney for Kamen, Lester made application directly to the Regent's Subcommittee on Discipline for six subpoenas (12a). On February 5, 1975, Regent Griffith denied Lester's application for the six subpoenas on the ground that the record was no longer open for the receipt of testimonial evidence (78a).

(5)

While the administrative proceeding was still *sub judice*, Lester commenced the present action by motion returnable March 14, 1975 seeking to enjoin Griffith from making his report and recommendation to the Full Board of Regents and to allow Lester to subpoena any and all witnesses (3a-9a).

The District Court on March 21, 1975, ruled that appellant was premature in his recourse to the Federal Courts (36a, 54a, 57a, 60a); that he made no proper showing of violation of any federal rights (57a); and he had a state remedy fully available including resort to the state courts (57a).

POINT I

This appeal is moot and should be dismissed since the relief sought by the petitioner-appellant in the District Court, namely, the enjoining of the issuance of a report to the full Board of Regents by its subcommittee on discipline had already been accomplished even before the return date of the District Court hearing.

Before the District Court, Lester sought to enjoin the Chairman of the Regent's Subcommittee on Discipline (Griffith) which met on February 5, 1975 from submitting a report to the Full Board of Regents, based upon the events of that hearing. Even before the return date of the motion before the District Court (March 14, 1975), Griffith had already issued the report sought to be enjoined (March 10, 1975) (compare 79a with 3a). The Full Board of Regents voted its approval of the report on March 21, 1975 (the date of oral argument before the District Court) and the final order concluding the administrative proceeding was issued April 7, 1975 (80a-81a).*

Lester at no time sought to enjoin the Full Board of Regents or the Commissioner of Education from performing any of its statutory duties. The documents which are contained in the appendix submitted by the appellant himself clearly show that this appeal is moot and should be dismissed.

* On July 10, 1975, Lester served a petition under Article 78 CPLR returnable in the Supreme Court, Appellate Division, Third Department, the proper method of reviewing the disciplinary proceeding under State law (Educ. Law § 6510, subd. 4).

POINT II

The District Court properly abstained from interjecting itself into the state disciplinary proceedings.

The District Court wrote no opinion but aside from the fact that Lester failed to set forth any facts warranting the extraordinary relief of injunction sought by him, the District Court, quite properly, declined to enjoin the State proceedings, following the rationale of *Younger v. Harris*, 401 U.S. 37 (1971). The District Court specifically stated that the State courts should have an opportunity to pass upon the licensee's claim of deprivation of rights (58a-59a).

The Supreme Court has declined to enjoin State disciplinary hearings in medical licensing cases. *Geiger v. Jenkins*, 401 U.S. 985 (1971) affirming 316 F. Supp. 370 (D.C.Ga. 1970) upon the authority of *Younger*. In *Geiger*, the Georgia State Board of Medical Examiners charged the licensee with conduct constituting grounds for suspension or revocation of his license to practice medicine. A hearing was scheduled before the Board for March 11, 1970. On March 10, 1970, the licensee commenced an action in the District Court for declaratory relief on constitutional grounds and to enjoin the Board from proceeding. A three-Judge District Court dismissed the action on the ground that the proceeding before the medical board was "judicial in nature" (316 F. Supp. at 372). See also *Erdman v. Stevens*, 458 F.2d 1205 (2d Cir. 1972), cert. den. 409 U.S. 889 (1972). Recently, in *Hoffman v. Pursue Ltd.*, — U.S. —, 43 L. ed 2d 482 (1975), the Supreme Court held that the "principles of *Younger* are applicable even though the state proceeding is civil in nature." 43 L. ed 2d, at p. 487.

This court has recently reached the same conclusion in *Anonymous v. Association of the Bar of the City of New York*, — F. 2d — and *Anonymous J and Anonymous R*

v. Bar Association of Erie County, — F. 2d —, decided April 3, 1975. The present case falls squarely within the holdings of these cases. The District Court dismissal should be affirmed.

POINT III

Petitioner-appellant has failed to show any valid constitutional defect in his state disciplinary proceeding and is improperly attempting to have this court review the record of a state disciplinary proceeding.

Lester claimed that his constitutional rights were violated when the Attorney General refused to issue more than 50 subpoenas which he requested prior to the commencement of a disciplinary hearing on February 15, 1974. Aside from the fact that he failed to appear in person or by counsel at that stage of the disciplinary proceeding, although he did submit a written answer and other documents, Lester misconstrues the law as to the issuance of subpoenas and his unlimited right to same.

The New York State Education Law § 6510, subd. 1(d)(4), which controls the issuance of subpoenas in this matter, states:

“(4) that the licensee shall have the right to produce witnesses and evidence in his behalf, to cross-examine witnesses and examine evidence produced against him, and to have subpoenas issued in his behalf to require the production of witnesses and evidence in manner and form as prescribed by the civil practice law and rules”

The CPLR governing the issue of subpoenas provides:

§ 2302. Authority to issue

“(a) Without court order. Subpoenas may be issued without a court order by the clerk of the court, a judge where there is no clerk, the attorney general, and the

attorney of record for a party to an action, an administrative proceeding or an arbitration, an arbiter, a referee, or any member of a board, commission or committee authorized by law to hear, try or determine a matter or to do any other act, in an official capacity, in relation to which proof may be taken or the attendance of a person as a witness may be required."

It is clear under these statutes that an attorney for a licensee in a disciplinary hearing may issue subpoenas on behalf of his client. Absent an attorney, the Committee itself is the proper issuer of subpoenas to compel the attendance of witnesses.

As a practical matter, in these disciplinary cases, the Attorney General does furnish blank subpoena forms to the licensee or his attorney as a matter of courtesy. However, in situations where the Attorney General feels that the licensee may be abusing the subpoena privilege or, as, in this case, is attempting to have subpoenas issued which are immaterial to the issues or which seek witnesses beyond the jurisdiction of the Committee, he may properly direct the licensee to request the subpoenas from the Hearing Panel itself. *Matter of Irwin v. Board of Regents*,* 27 N.Y. 2d 292 (1970).

In this case the Attorney General by letter declined to issue subpoenas and suggested that the licensee request them directly from the committee (13a-14a). That letter clearly states that no objection would be raised by the Attorney General to the issuance of any subpoena by the

* In *Irwin, supra*, the Appellate Division in 1969 ruled that the Hearing Panel was bound by the CPLR provisions in the issuance of subpoenas. The Court of Appeals, while affirming the result, ruled that under the existing statute (1970) the Hearing Panel could issue subpoenas apart from the CPLR restrictions. In 1971, the legislature amended the statute. (Educ. Law § 6510(1)(d) authorizing the Hearing Panel to issue subpoenas "in the form and in manner as prescribed by the civil practice law and rules."

hearing panel for a witness whose testimony could be shown to be relevant to the issues raised by the charges. Since the licensee did not appear, he has never shown the relevancy of the subpoenas he sought.

The Attorney General's refusal to issue subpoenas under the circumstances of this case was entirely within the law and a reasonable exercise of good judgment. Lester's failure to appear and demonstrate the relevancy of the requested subpoenas, in effect, amounted to an abandonment thereof. Lester has utterly failed to demonstrate any illegality amounting to a federal constitutional issue.

CONCLUSION

The order of the District Court should be affirmed and this appeal dismissed with costs.

Dated: New York, N.Y., July 15, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
261 Madison Avenue
New York, New York 10016

SAMUEL A. HIRSHOWITZ
JOHN J. O'GRADY
Assistant Attorneys General
of Counsel

(58287)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.
SOUTHERN DISTRICT OF NEW YORK

..... DIANA IROM....., being duly sworn, deposes and says
that she is a Senior Typist..... in the office of the Attorney General of the
State of New York, the Attorney for respondent-appellee..... herein. On the 17th
day of July, 1975 she served the annexed/upon the following named persons:

Irvin Boyd GREEN, Esq.
1116 Warburton Avenue
Yonkers, N.Y. X 10701

ELIAS LESTER, M.D.
310 Keap Street
Brooklyn, New York

and petitioner-appellant
Attorney / in the within entitled appeal..... by depositing a true and correct copy thereof, properly
enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States
261 Madison Avenue, New York, N.Y. L0016 and petitioner-appellant
XXXXXXX directed to said Attorney/ at the address within the State designated by them
for that purpose.

Sworn to before me this
17th day of July, 1975
JOHN J. O'GRADY
Assistant Attorney General of
the State of New York

Diana Irom
DIANA IROM



Sir:

Please take notice that the within is a true
copy of a
this day duly entered herein in the office of
the Clerk of

Dated, N.Y., , 19

Yours, etc.,

LOUIS J. LEFKOWITZ,

Attorney General,

Attorney For

Office And Post Office Address

Capitol, Albany, N.Y. 12224

New York Office

TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047

To , Esq.

Attorney for

Sir:--

Please take notice that the within

will be presented for settlement and signature
herein to the Hon.

one of the judges of the within named Court, at

in the Borough of

City of New York, on the

day of

19 , at M.

Dated, N.Y., , 19

Yours, etc.,

LOUIS J. LEFKOWITZ,

Attorney General,

Attorney For

Office And Post Office Address

Capitol, Albany, N.Y. 12224

New York Office

TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047

To , Esq.

Attorney for

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BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ,

Attorney General

Attorney for.....

Office And Post Office Address

Capitol, Albany, N.Y. 12224

New York Office

TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047

Tel.

Personal service of a copy of

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